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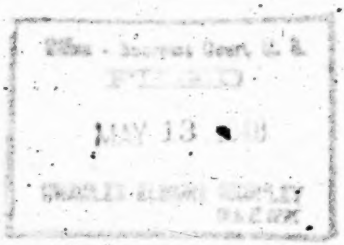

No. 732

IN THE

# Supreme Court of the United States

October Term, ~~1947~~ 1948

AUGUST KLAPPROTT,
*Petitioner,*

v

UNITED STATES OF AMERICA.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT*

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

In view of certain allegations contained in respondent's brief, petitioner deems it appropriate to file a reply brief, and while in some instances the matters contained therein perhaps have been included in the main brief, yet we feel the seriousness of the questions involved cannot be overemphasized.

The questions presented in respondent's brief are as follows:

1. *Whether, in the circumstances of this case, the District Court properly denied petitioner's motion to vacate a judgment of denaturalization entered by default four and one-half years earlier.*

2. *Whether a defendant who has deliberately defaulted in a denaturalization proceeding is entitled as of right to have counsel appointed for him and to be present in court before a judgment is entered.*

3. *Whether a judgment of denaturalization may be entered by default without a hearing.*

## ARGUMENT

**Whether, in the circumstances of this case, the District Court properly denied petitioner's motion to vacate a judgment of denaturalization entered by default four and one-half years earlier.**

In reply to the argument advanced as to question one, we refer to the opinion of the District Court (R 24a) and which clearly indicates that *laches* was the basis for denial of the relief sought. *The Court held that petitioner's failure to move in an attempt to vacate the judgment at an earlier date was entirely imputable to his wilful and inexcusable neglect.* In argument the Government lays stress on the fact that Klapprott did not file an answer to the complaint during the *fifty-two day period that elapsed between the time service was had upon him and the date of his arrest.* Consideration most surely cannot be afforded such contention in that the Complaint clearly stated and the statute so provides, Section 338 of the Nationality Act of 1940, c. 876, 54 Stat. 1137, 1158, 8 U. S. C. 738, (b) *that petitioner had sixty days personal notice in which to make an answer to the petition of the United States.* No matter what the reason for petitioner's failure to file an answer before the sixty day period had expired, it cannot be considered, in that it made no difference whether he replied on the first or last day of the period; *and no neglect can be inferred from failure to answer the complaint during the fifty-two day period prior to petitioner's arrest.*

It is correct that the record fails to contain or show any effort on part of petitioner to ascertain whether the letter which was taken from his person at time of arrest by the authorities (R 16a) had ever been mailed or received by the American Civil Liberties Union. This particular letter was written in an effort to obtain legal assistance, but whether he did, or did not, inquire if it reached its destination should not be a matter of consideration. When one reflects back to the period of July, 1942, *the arrest of many members of the German-American Bund, Klapprott's indictment with others in New York on a conspiracy charge, Wilbur Keegan et al v. United States, and his removal from New Jersey to New York, held under a bond of Twenty-Five Thousand Dollars ($25,000.00), unable to obtain his release and as result confined in jail, we respectfully submit that petitioner cannot be justifiably charged under such circumstances and conditions with neglect in not seeking information as to what became of the letter.* No doubt jail regulations limited petitioner as to persons with whom he could correspond, and after counsel was appointed to represent him in the conspiracy case, we submit he did the reasonable thing, i. e. he requested his court appointed attorney to inquire into and assist him in the citizenship case (R 16a); *and notwithstanding the fact that counsel agreed to look into petitioner's case, the record supports the conclusion that nothing was done* (R 16a).

In support of the Government's contention that incarceration in prison should not have prevented Klapprott from seeking legal assistance and moving to set aside the default judgment, the case of *United States v. Kuhn et al, 49 F. Supp 407*, is cited. It is stated, that in this case a number of petitioner's co-defendants in the Selective Service conspiracy case were actively defending their denaturalization proceedings, *and that it seemed unlikely that petitioner would not have been aware of such fact. We submit that such an assumption is purely speculative of nature, and with petitioner confined in jail, should know-*

*edge of the actions of other persons be imputed to him?* There is no allegation that the petitioners in the foregoing case were confined in the same prison as petitioner or that he had any means of obtaining information concerning the above case.

It is correct that petitioner had counsel appointed in the Selective Service conspiracy case, but the fact that counsel was appointed in a criminal case as provided by the *Sixth Amendment of the Constitution* is no basis for inference that petitioner had even a remote conception that counsel would have been appointed in the civil proceeding if he had so requested. We cannot stress the point too strongly that when a citizen is arrested, speedily removed from his home and taken to another jurisdiction, held under an excessive bond, he should not be charged with the same duty that one under normal circumstances and conditions should bear.

The fact that Klapprott did not move for a period of approximately four and one-half years in an effort to set aside the default judgment cancelling his certificate of citizenship can most certainly be attributed to the following facts:

*His indictment in the case of United States v. Wilbur Keegan et al; Southern District of N. Y.; his removal from the State of New Jersey to New York; confinement in prison, under a bond of $25,000.00, his impoverished financial condition preventing him from making bond; his subsequent conviction and five years sentence imposed in the Selective Service conspiracy case; the affirmation of that conviction by the United States Circuit Court of Appeals for the Second Circuit, Wilbur Keegan et al v. United States, 171 F 2d 248; petitioner's removal to the Federal Correction Institution at Milan, Michigan; his subsequent indictment in the case of United States v. Joseph McWilliams et al, in the District of Columbia; his removal from Michigan to the District of Columbia; a*

*protracted trial of approximately 8 months as a defendant in the foregoing case; a reversal by this Court of the case of Wilbur Keegan v. United States, 325 U. S. 348; the dismissal of the case of United States v. Joseph McWilliams et al, which was affirmed by the United States Court of Appeals for the District of Columbia, United States v. Joseph McWilliams et al, U. S. Ct. of Appeals for D. C. Case No. 9438, most certainly constitute a turmoil of legal entanglements that should justify a defendant so involved as was this petitioner for not moving more promptly in the civil case involving his citizenship.* The Government must concede that one serving a five year sentence, and facing a possible additional ten year sentence was most surely in no state of mind to think normally or be charged with normal actions under such conditions. *Klapprott cannot justifiably be charged with knowledge of the Federal Rules of Civil Procedure or of other legal requirements, particularly while under the strain and stress of protracted trials, and with that contention we feel there is no dispute. In view of the foregoing, can it reasonably be said that the petitioner was justifiably charged with laches? We think not:*

Question two presented in the Government's brief reads as follows:

**Whether a defendant who has deliberately defaulted in a denaturalization proceeding is entitled as of right to have counsel appointed for him and to be present in court before a judgment is entered.**

In the brief filed by respondent, the question as to whether United States Attorney's Office at Newark, New Jersey had knowledge of Klapprott's removal to New York *appears to be entirely ignored*, and the only inference is they knew or should have known of that proceeding. On pages 2, 4, 7, 17 and 23 of petitioner's brief it is stated that Klapprott had been removed from New Jersey to New York

and held under a bond of Twenty Five Thousand Dollars ($25,000.), and there is nothing contained in respondent's brief to the effect *that the authorities were without such knowledge at the time of application for the default judgment for petitioner's failure to answer the complaint within the prescribed period of time. We submit that if the representatives of the Government had knowledge of existing conditions concerning Klapprott, it was their duty to render every assistance to have him present in the District Court in New Jersey, and the Government and only the Government could have accomplished his appearance at the time default was taken. We accordingly refute and contest the statement in respondent's brief that petitioner deliberately defaulted.*

As to whether petitioner had the right to have counsel appointed for him in a case that the authorities appear to concede to be civil of nature we will not discuss, however, *we state that the circumstances of this particular case should have commanded every effort on the part of the Government to have counsel appointed, and particularly to have called to the attention of the District Court, at the time of seeking a default judgment, the fact that the defendant was incarcerated in New York City, indicted with many others charged with a Selective Service Conspiracy, held under an excessive bond which he could not raise, and as result thereof he was unable to appear in Court,* It is respectfully submitted that if such facts had been made known to the Court, we are confident the entry of a default judgment would have been withheld, and the Court would of its own volition have appointed counsel to represent Klapprott. The fact that petitioner's name was included with those of a great number of other persons in the case of *Citizens Protective League v. Clark*, 155 F 2d 290, cert. denied 329 U. S. 797, is not indicative of any ability on his part at that time to retain counsel to institute a proceeding in the State of New Jersey in an effort to vacate the default judgment heretofore entered against

him. At the time the above case was filed, Klapprott was incarcerated in jail in the District of Columbia, and he and a great number of other persons, in addition the Citizens Protective League, were made parties to that proceeding, and all represented by the same counsel.

Question 3 presented in respondent's brief reads as follows:

**Whether a judgment of denaturalization may be entered by default without a hearing.**

At the outset we urge that the Nationality Act of 1940 does not specifically provide for judgment by default except possibly under certain circumstances, which do not appear in this case, and that appears to be confirmed by the majority opinion of the court below (R 33).

> "'While the statute concerning denaturalization does not expressly say that a judgment may be taken by default against a person who does not appear, it does provide for substitute service * * *'".

The facts in this case most certainly support the findings of Circuit Judge Stephens in his dissenting opinion (R 40) as follows:

> "I dissent. I entertain serious doubt as to the legality of a decree revoking citizenship without proof being adduced in open court. I hold that, *in the circumstances of this case*, the case should be set aside"

In Judge Stephens' reference to the circumstances of this case we can only assume he meant the fact that Klapprott had been removed to another jurisdiction prior to the sixty-day period in which to answer the complaint, so that his ability to appear to contest the default judgment was entirely in the hands and discretion of those who sought to cancel his citizenship, and under such circumstances all evidence ex-parte should have been presented by the Government to support the allegations of the complaint. We are entirely in accord with the learned judge

in his dissent, and urge that in all fairness to this petitioner he should have had his day in Court.

In view of the respondent citing the case of *United States v. Borchers 163 F. 2d 347, 348-350, certiorari denied, 332 U. S. 811* in support of the right to take a default judgment without the production of evidence ex parte, we feel constrained to print additional parts of the opinion to show that the case is most certainly not comparable with the facts presented in the instant case.

In the opinion of Circuit Judge Augustus N. Hand it is stated:

> "The present appeals mark the *fourth time* the defendants Borchers and Fentzke and the *fifth time* that Knupfer have attempted to challenge judgments of denaturalization entered against them by default in 1943.
>
> • • • •
>
> "Knupfer, as we have related in a previous decision —United States ex. rel. Knupfer v. Watkins, 2 Cir. 159 F2d 675—*filed an answer, but before trial, withdrew his answer and "demanded" cancellation of his citizenship. Borchers and Fentzke filed no formal answers, but wrote letters to the United States Attorney declaring that they thereby renounced their citizenship, but denying the allegations of the complaint.*
>
> • • • •
>
> "appeals were filed from two of the orders that had been entered denying their motions.
>
> • • • •
>
> "Those appeals were thereupon abandoned by stipulation of the parties and by order of the Eastern District Court dated June 27, 1946".
>
> • • • • •
>
> "We hold that the orders of Judge Abruzzo should be affirmed because: (1) Motions to open and vacate do not lie as a substitute for a DELIBERATELY

ABANDONED APPEAL, (2) THE APPELLANTS IN EFFECT CONSENTED TO THE ENTRY OF THE DECREES AGAINST THEM, (3) the error they relied on of neglect to give them a three-days notice of application for judgment was at most only procedural and *not jurisdictional, and is not shown to have been prejudicial to their rights,* (4) if the proceedings be treated as in the nature of bills of review they are defective in failing to show any *excuse for delay* and to furnish any facts to support charges of fraud.

The specific differences between the Borchers and the Klapprott cases are:

1. *Klapprott never abandoned his appeal.*

2. *Klapprott never consented to the entry of the decree against him.*

3. *Klapprott did not write a letter to the United States Attorney as did Borchers and Fentzke declaring that he thereby renounced his citizenship.*

4. *Klapprott did not demand cancellation of his citizenship as did Knupfer.*

5. *Klapprott's confinement in another jurisdiction was such that he was entitled to a 3 days notice of the application for judgment by default, and the absence of such notice was prejudicial to his rights.*

6. *Klapprott has furnished sufficient excuse for his apparent delay in moving to set aside the default judgment in that his confinement for approximately four and one-half years in midst of a turmoil of litigation has definitely been established and provides a justifiable excuse.*

In view of the foregoing facts it is urged that the circumstances in the Borchers case are so different from those in the Klapprott case, that the opinion of the Second Circuit Court of Appeals so far as it relates to default judgments cannot be applied here.

We submit that the questions presented merit review by this Honorable Court.

## CONCLUSION

For the reasons stated in petitioner's original and reply briefs, we sincerely urge that the writ of certiorari should issue.

Respectfully submitted,

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(Emphasis supplied)